The interface between intellectual property, competition and human rights:
Overview of field and proposed contribution to knowledge

Abbe E. L. Brown

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IP: rationale and problems

Justifications for IP include stimulation and reward of innovation, creativity and diffusion of knowledge,[1] on the basis that society gains economically from efficiencies, disclosure and activity encouraged by the limited exclusivity conferred by IP.[2] Another approach is that it is morally valid for persons to be prevented from dealing with, or copying, a work without the creator's consent.[3] There is a debate, however, as to the validity of these justifications, and whether all or some IP rights in fact hinder what they purport to encourage.[4] Further, when the IP rights are rarely owned by the creator,[5] who may have developed the work anyway and may not object to some further use or adaptation of it,[6] the economic and moral arguments appear weak.[7]

In addition, the evolution of the IP system has been driven by developed industrialised nations, or those seeking to be so, and its structure reflects their present values;[8] these are not suited to encouragement of innovation and creativity in all developed nations,

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[1] Cornish, W.R. (2004) "*Intellectual Property. Omnipresent, Distracting, Irrelevant?*" Clarendon Law Lectures, Oxford University Press, Oxford, UK ("Cornish"), 9; Shikwati, J.S. "Invisible Wealth" 4 March 2004 http://www.techcentralstation.be/030404B.html; Report of the Commission on Intellectual Property Rights "Integrating Intellectual Property Rights and Development Policy" ("CIPR") <http://www.iprcommission.org> September 2002, 14-17

[2] See Drahos, P. "Introduction", ("Drahos") 4-6 in Drahos, P. and Mayne, R. (eds) (2002) "*Global Intellectual Property Rights. Knowledge, Access and Development*" Palgrave Macmillan, Basingstoke and New York ("Drahos/Mayne") – although Drahos does not accept this argument

[3] See Chapman, A.R "Approaching intellectual property as a human right: obligations related to Article 15(1)(c)" Copyright Bulletin, vol XXXV No. 3, July-September 2001 UNESCO Publishing ("Chapman"), 8; Garnett, K. Rayner James, J. Davies, G. (1999) (14th ed) "*Copinger and Skone James on Copyright*", Sweet & Maxwell, London, UK ("Copinger"), 29; and Picciotto, S. "Defending the Public Interest in TRIPS and the WTO" ("Picciotto") in Drahos/Mayne, 183

[4] See Macdonald, S. "Exploring the Hidden Costs of Patents" ("Macdonald") in Drahos/Mayne, 13, 15 and 30; CIPR 96/7, 126/7; Oxfam Discussion Paper 12/01 "Intellectual Property and the Knowledge Gap" ("Oxfam"), <http://www.oxfam.org.uk/policy/papers/knowledge/knowledge.htm> ("Oxfam"), 2

[5] But by publishers, investors and employers; see Chapman, 20-1 and re UK position, section 39(1) Patents Act 1977 ("PA") and section 11(2) Copyright Designs and Patents Act 1988 ("CDPA")

[6] Eg comments of Alex Kapranos of Franz Ferdinand, presentation at University of Edinburgh 29 April 2004 (transcript shortly to be released)

[7] see Chapman, 22

[8] See CIPR 14-21, Chapman, 7. Attempts for a more inclusive approach, with revisions to the Paris Convention for the Protection of Industrial Property 1883 ("Paris Convention") and Berne Convention for the Protection of Literary and Artistic Works 1971, ("Berne Convention") largely failed – see Chapman, 9 and Cornish, 3

much less the developing regions, or in all fields of activity.[9] Concern in this regard has increased following the drive by some developed countries and IP owners for international minimum standardisation of IP protection,[10] leading to the TRIPS agreement.[11]

Key contemporary global issues fuelling the debate as to the role of IP are access to patented medicines in developing countries;[12] the function of patents and plant variety rights in developing regions' agriculture and in access to food;[13] the impact on global society of multinational corporations, with power stemming in part from brands;[14] the relationship between IP rights and traditional knowledge and folklore;[15] and the ability of copyright owners to restrict some further use, adaptation and exploitation, in further creativity and education, of material apparently freely available on the internet.[16] There is particular concern that such reliance on copyright can lead to de facto private control of the underlying information.[17] From the commercial perspective, there is concern at use of wide patents to restrict further innovation;[18] use of patents and copyright to prevent competition in and development of other

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[9] Note that even in developed countries, IP protection or regulation has not always been considered a key part of commercial growth – often the contrary – see Pretorius, W. "TRIPS and Developing Countries: How Level is the Playing Field?" ("Pretorius") 184 in Drahos/Mayne. See also Correa, C.M. "Pro-competitive Measures under TRIPS to Promote Technology Diffusion in Developing Countries" ("Correa"), 40/41, in Drahos/Mayne; Picciotto, 224 and Paine, T. (1996 ed) "*Rights of Man*" Wordsworth Classic of World Literature Wordsworth Editions Ltd, Ware, Herts, UK, 52.

[10] due to concerns re free riding and piracy (see Braga, C.A.P (1989) "The Economics of Intellectual Property Rights and the GATT: a View from the South*", Vanderbilt Journal of Transnational Law*, 22 (2) ("Braga") in Towse, R and Holzhammer, R (eds) (2002) "*The Economics of Intellectual Property vol IV Competition and International Trade*" The International Library of Critical Writing in Economics 145, Cheltenham, United Kingdom, Edward Elgar Publishing Ltd ("Towse") 243-64, and driven by the interests of large industry (see Drahos, 4), and desire for matters to be include in the WTO framework with its dispute resolutions procedures – CIPR, 157. See Story, A. "Don't Ignore Copyright, the 'Sleeping Giant' on the TRIPS and International Educational Agenda" ("Story"), 133 in Drahos/Mayne and Sherwood, R.M. (1990) "*Intellectual Property and Economic Development*" Westview Special Studies in Science, Technology, and Public Policy. Westview Press Inc, Colorado, USA and Oxford, UK ("Sherwood"), 3-4 re lobbying by IP owners.

[11] Trade-Related Aspects of Intellectual Property Annex 1 C to Marrakesh WTO Agreements 1994 <http://www.wto.org/english/docs_e/legal_e/27-trips.pdf>

[12] Oxfam Section 1, para 2

[13] CIPR, 57-65

[14] Klein, N. (2001) "No Logo" Flamingo, Great Britain ("Klein") 64, 97-8, 118, 122, 130, 166, 176, 227, 340, 361

[15] See Gibson, J. "Traditional Knowledge and the International Context for Protection", (2004) 1:1 *SCRIPT-ed*, @: <http://www.law.ed.ac.uk/ahrb/script-ed/docs/TK.asp>, introduction and para 1.4 ("Gibson")

[16] See Oxfam Section 1, para 2; Cornish, 60-61; Chapman 22

[17] Oxfam Section 1, para 2; Cornish, 60-61; Chapman 22

[18] See Cornish, 8-9; CIPR, 126-130

markets;[19] use of patents and copyright to limit the growth of market entrants and competitors in networked and standardised industries;[20] and enforcement of IP rights to further and potentially abuse an alleged monopoly[21] or oligopoly.[22] More generally, there is concern at use of IP to exclude key technology from the public domain.[23]

Should and could IP be restricted?

While IP plays a part in creating these situations, other factors such as lack of infrastructure, finance and education[24] also bear some responsibility. Further, national, regional and international IP laws include limits on duration of rights,[25] specific infringement tests[26] and also limits on when the rights can be enforced.[27] The

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[19] but see *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG* ("IMS") 29 April 2004 <http://curia.eu.int/jurisp/cgi-bin/gettext.pl?lang=en&num=79959570#c19010418&doc>

[20] Cotter, T.F. (1999) "Intellectual Property and the Essential Facilities Doctrine" Antitrust Bulletin, XLIV (1) Spring, 211-50 ("Cotter") in Towse, 202-4

[21] See generally re monopoly Bishop, S. and Walker, M. (2002) (2nd ed) "The Economics of EC Competition Law: Concepts, Applications and Measurement", Sweet & Maxwell, UK ("BW"), 11, 17, 21-24, 27-8,33; Malloy, R.P. "The Limits of Science in Legal Discourse – A Reply to Posner", 181, and Evensky, J. "The Role of Law in Adam Smith's Moral Philosophy: Natural Jurisprudence and Utility", ("Evensky") 211 in Malloy, R.P and Evensky, J. (eds) (1994) "*Adam Smith and the Philosophy of Law and Economics*" Kluwer Academic Publishers The Netherlands ("Malloy"); although it is rare that IP rights will give rise to a monopoly in the competition law sense – see Cornish, W. R. and Llewelyn, D. (2003) (5th edition) *"Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights"* Sweet & Maxwell, London, UK, 39 but note also *Intel Corp v VIA Technologies* [2003] 12 and 33, and IMS

[22] See generally re oligopoly BW, 27-8

[23] Eg, patenting by Celera re human genome cf Human Genome Project under which all information should be publicly available; see Sulston, J. "Forever Free" http://www.biotech.ubc.ca/db/bioethics/patentarticles.html, Jasny, B. R. and Kennedy, D. "The Human Genome" http://www.sciencemag.org/cgi/content/summary/291/5507/1153. See also Greenpeace: UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights. Economic, Social and Cultural Rights, Intellectual Property and human rights. Report of the Secretary-General. E/CN.4/Sub.2/2001/12 14 June 2001 <http://www.hri.ca/fortherecord2001/documentation/commission> ("Report on Economic, Social and Cultural Rights"), para III, D, 1; Chapman 22

[24] See CIPR 30, 31, 35, 38-9

[25]: Eg article 12 TRIPS (copyright), article 33 TRIPS (patent), article 18 TRIPS (trade mark); article 46 Council Regulation on Community Trade Mark (EC) 40/94 ("CTM Regulation"); re UK, section 25(1) PA, section 12 CDPA and section 42 Trade Marks Act 1994 ("TMA")

[26] Eg article 28 TRIPS (patent), article 9 TRIPS and article 9 Berne Convention (copyright) and article 16 TRIPS (trade mark); article 9 CTM Regulation; section 60 PA, section 10 TMA and sections 16 and 17 CDPA.

[27] parallel importing: section 12 TMA (but EEA only), article 13 CTM Regulation; experimental use: (US, *Roche Products Inc v Bolar Pharmaceutical Co Inc* (1984) and *Madey v Duke University* (2002),

latter provide some potential solutions to problems considered – for example, compulsory licensing and parallel importing could be used to enable access to medicines[28] or information,[29] and as the basis for use of IP protected material for some experimental and research purposes.

However, these do not deal with all concerns,[30] and also do not exist in all IP systems. Even where they do, it may be impractical for those seeking access to IP to contemplate court proceedings to take advantage of them, because of time, cost and commercial factors.

As a result, and with the evolution of more globally focussed social norms and standards[31] (partly fuelled by new technologies increasing awareness),[32] pressure mounts for a review of IP.[33] The goal in any such review should be to produce a system which is less focussed on the needs of corporations and developed world economies, and which addresses the challenges of new technology, commercial reality, global poverty and need in a more equitable way.[34]

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section 69.1 Japanese Patent Law, article 11.2 German Patent Act 1981 and sections 60(2)(a) and (b) PA; compulsory licensing - sections 48 and 48A PA and sections 135A-H CDPA; TRIPS - general exceptions - article 13 (copyright), article 17 (trade mark) and article 30 (patent), background provisions articles 7 and 8(1); no provision re parallel importing (article 6) and only permission for compulsory licensing (article 31).

[28] See Doha Declaration Declaration on the TRIPS agreement and public health, adopted 14 November 2001, WT/MIN(01)/DEC/2 <http//www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_trips_e.htm> ("the Doha Declaration"), articles 5b, c and 6. This is considered further below.

[29] See Liebowitz, S. J. "Alternative Copyright Systems: The Problems with a Compulsory License" 31 August 2003 <http://www.utdallas.edy/~liebowit/intprop/complpff.pdf ("Liebowitz")

[30] Eg limitation on experimental use defence re commercial trials; often need for court action to obtain compulsory licence if IP owner unwilling

[31] See Malloy, R.P. "Adam Smith and the Modern Discourse of Law and Economics" ("Malloy1"), 137 in Malloy

[32] as has previously been the case – see 1968 activity and the role of television: http://books.guardian.co.uk/reviews/history/0,6121,1194096,00.html review of Kurlansky, M (2004) "*1968: The Year That Shook The World*" Jonathan Cape, UK

[33] See eg CIPR i. See also Macdonald, 13; Love, J. "Access to Medicines and Compliance with the WTO TRIPS Accord: Models for State Practice in Developing Countries", 75-86 in Drahos/Mayne; Drahos, P. "Negotiating Intellectual Property: Between Coercian and Dialogue", ("Drahos1") 179 in Drahos/Mayne.

[34] See also Helfer, L.R. "Human Rights and Intellectual Property: Conflict or Coexistence") 5 MINN. INTELL. PROP. REV 47 (2003) at http://mipr.umn.edu/archive/v5n1/Helfer.pdf ("Helfer"), 48, 58; CIPR 163

Given that the present IP system derives largely from capitalist countries, the application of socialist[35] or feminist[36] agendas could produce a system which, in theory, was more balanced and addressed contemporary concerns. Owing to the economic failure,[37] however, and inflexibility[38] of the former communist societies, and the lack of mainstream feminist agendas, such arguments have not to date played a major role in the IP debate, save in respect of collective rights and traditional knowledge.[39] Further, given the present power of multinational corporations and conventional western, capitalist, male perspectives in the international IP owning community,[40] it is unlikely that imposing such a new regime, without dialogue and widespread international support, would be practically effective, whatever its theoretical appeal.

In addition, the economic rationales for the present IP system cannot be wholly discounted, particularly given, again, the present role of large corporations in commercialising innovation and creativity, at least in the developed world.[41] Further, if IP protection is available and subject to a favourable enforcement regime[42] in some countries and not others, businesses will at least consider relocating to these new countries, and ceasing activity in or relationships with others.[43] For this reason, practical change will be impossible without the support of the main industrialised nations, including the United States.

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[35] See Shestack, J. "The Philosophical Foundations of Human Rights" ("Shestack") in Symonides, J. (ed) (2002) "*Human Rights: Concepts and Standards*" Dartmouth Publishing Co Ltd, Aldershot, England and Ashgrove Publishing Co, Vermont, USA and UNESCO, Paris ("Symonides), 40-1
[36] See Patmore, G. "Identifying Rights for the 21st Century", in Galligan, B. and Sampford, C. (eds) "*Rethinking Human Rights*" (1997) The Federation Press, Sydney, Australia, ("Galligan") 107-112
[37] See Cornish, 3
[38] See Mullerson, R. "Perspectives on Human Rights and Democracy in the Former Soviet Republics" in Pogany, I. (ed) "*Human Rights in Eastern Europe*", (1995) Edward Elgar Publishing Ltd, Aldershot, Hants/Vermont USA, 51- 57
[39] See Gibson
[40] See footnote 10 above
[41] See Sherwood, 52, Gutterman, A. (1997) "Inter-Firm Co-operation. Competition Law, and Patent Licensing: A US-EC Comparison" in S Deakin and J Michie (eds) "*Contracts. Co-operation and Competition:studies in Economics, Management and Law",* Oxford: Oxford University Press 379-91; 139-160, ("Gutterman") in Towse, 141-2
[42] eg legislation restricts export to limit parallel importing
[43] See Ingdahl, W. "Patents and Life" 6 May 2004 <http://www.techcentralstation.be/050604A.html>

Indeed, imposition of change may be counterproductive, particularly in respect of patents, where there is a real choice as to whether to patent or rely on trade secrets. While the latter involves foregoing the benefits of a patent, it avoids disclosing details of the technology to competitors for their use after the patent term has expired. As a result, the public also loses the benefit of that knowledge.[44]

As is considered below, there has been some use of competition law and human rights to address IP issues of the nature considered, both in individual situations and in support of a more formal limitation of IP. There is a debate, however, as to whether it is jurisprudentially valid for IP, arguably a form of property, to be reduced by other legal doctrines. [45] Allied to this is whether each of human rights[46] and competition[47] is a higher, more basic doctrine than IP; if so, there is less theoretical basis for objecting to changes to IP, which, as the exception, should be restricted as necessary (some rights potentially more than others) to enable appropriate operation of the other doctrines.

Further consideration will now be given to the present relationships of competition and IP, and human rights and IP; present solutions to what are seen as IP problems; and the extent to which such solutions are and could be workable, or whether alternatives are still required.

Role of Competition law

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[44] See Sherwood, 18, 20; see article 39 TRIPS re protection of trade secrets.
[45] See Cornish, 2; MacCormick, Sir N "On the Very Idea of Intellectual Property: an Essay according to the Institutionalist Theory of Law", ("MacCormick"), http://www.law.ed.ac.uk/script/newscript/online.htm> 30, 32-34, Epstein, R.A (1982) "Private Property and the Public Domain: The Case of Antitrust" in J.R. Pennock and J.W.Chapman (eds) *Ethics, Economics, and the Law: Nomos XXIV*, Chapter 3, New York: New York University Press, 48-82, 69-103 in Towse, 76-81, 85-91
[46] See Resolution 2001/21http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.SUB.2.RES.2001.21.En?Opendocument ("2001 Resolution") article 3;
[47] See Cornish, 113-4

There has been much discussion and case law on the relationship between IP and competition, and the use of competition law tools to address areas of concern.[48] This has taken place in developed and developing regions, particularly regarding parallel importing of generics and patented products, and compulsory licensing, in the accessing medicines debate;[49] unjustified restrictions on competitors entering separate markets for which use of IP is required and consumer demand is not met;[50] parallel importing of luxury branded goods;[51] compulsory licensing to require greater sharing of IP regarding some uses of and rights over information;[52] the balance between encouraging multilateral collaboration and preventing restriction of innovation in a particular field;[53] and restriction on IP owners' abilities to enforce rights if the right itself confers market power.[54] In each case a balance has been struck between competing priorities,[55] with key factors also coming from the immediate environment, for example preservation of free competition within the European Community.[56] The relationship has also been considered by governmental commissions and enquiries in the developed world.[57]

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[48] See Cotter

[49] as was seen in the Doha Declaration. However, attempts continue to enable import of generics where no manufacturing capability to exploit compulsory licence. See "Implementation of paragraph 6 of the Doha Declaration on the TRIPS agreement and public health" Decision of the General Council at 30 August 2003. See also litigation in South Africa, which was ultimately settled, regarding Medicines and Related Substances Control Act (As Amended) 1997 (considered in detail in Murakyembe, H. and Kanja, G.M. "Implications of the TRIPS Agreement on the Access to Cheaper Pharma Drugs by Developing Countries: Case Study of South Africa v The Pharmaceutical Companies" Zambia Law Journal vol 34, 2002, 111 ("Murakyembe"); cf debate regarding compulsory licensing of anthrax in US pursuant to 28 U.S.C 149 - see <www.flonnet.com/fl1824/18241020.htm>

[50] See IMS

[51] See *Levi Strauss & Co v Tesco Stores Ltd* [2003] R.P.C. 18 ("Levi")

[52] See Copinger, 1584. Attempts to introduce compulsory licence in EC Database Directive (96/9) failed after lobbying from publishers – see Mirchin, D "The European Database Directive Sets the Worldwide Agenda", <http://www.nfais.org/publications/white_papers_2.htm>3. See also Colston, C "*Sui Generis* Database Right: Ripe for Review?" <http://elj.warwick.ac.uk/jilt/01-3/colston.html> and Liebowitz

[53] See article 81 EC Treaty and block exemptions re Technology Transfer (Regulation 240/96, OJ 1996 L31/2 and proposed new Technology Transfer Block Exemption and draft IP Guidelines (2003/C 235/04, OJ C235/10 1.10.2003 due to come into effect on 1 May 2004); note Jacquemin, A. (1997) "Cooperative Agreements in R& D and European Antitrust policy" *European Economic Review*, 32, 551-60, in Towse, 129-138, 129-137, and Gutterman, 140, 144 –restrictions may be counterproductive

[54] See *RTE and ITP v E.C Commission* [1995] 4 CMLR 718; *Intel Corp v VIA Technologies* [2003] 12 and 33; *Philips Electronics NV v Ingman Ltd* [1998] 2 CMLR 839

[55] Drahos considered one aspect of the balance, noting that if IP is too strong then there will be monopoly costs, if it is too weak then there will be free riding and under investment: see Drahos1, 162

[56] Korah, V. (1986) "EEC Competition Policy – Legal Form or Economic Efficiency" , *Current Legal Problems*, 39, 85-109, ("Korah") in Towse, 104-128, 104, 110

[57] See US 2002 hearings "Competition and Intellectual Property and Policy in the Knowledge Based Economy"; Australian Report of Intellectual Property and Competition Review Committee.

The basic function of competition law, however, is to deliver economic objectives.[58] There are conflicting theories of economics and competition,[59] which can be used by different sides of the IP debate. The Chicago school focuses on the need for efficiency,[60] supporting encouragement of innovation theories of IP: if the outcome of a strategy is efficient, then the fact that this may have local moral and social disadvantages may be irrelevant.[61] This justification for IP breaks down, however, if the technology, work or brand is not adequately exploited, and is thus removed from the public domain without any wider economic benefit for society,[62] or if the efficient lack of duplication leads to inflexibility of thought.[63] An alternative objective, protection of the consumer by increased choice and information,[64] is relied upon by those seeking better use of online material[65] and cheaper branded imported goods.[66] A third theory, protection of competitors,[67] is one of the arguments used by those seeking compulsory licences,[68] and objecting to enforcement,[69] of IP rights. A fourth theory is that economics is to mirror and deliver evolving norms and morality,[70] which is of potential assistance to those attacking IP in the medical and education fields.

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[58] See BW, 11-21
[59] See BW, 24; Malloy1, 132
[60] See Korah, 104-5, Malloy1, 132-4
[61] Malloy1, 128, Posner, R.A. "Law and Economics *Is* Moral" 170, 174-5 in Malloy, and Posner, R.A. "Rebuttal to Malloy", 187; in Malloy
[62] Kamperman Sanders, A. (1997) "*Unfair Competition Law. The Protection of Intellectual and Industrial Creativity*" Clarendon Press, Oxford, UK, 101-104, Jacquemin 132
[63] Jacquemin, 134-5
[64] See Whish, R. (2001) (4th ed) "Competition Law", Butterworths, UK ("Whish"), 16-17
[65] This argument has been rejected by the EC regarding copyright in online material: see Software Directive (91/250), article 4; Copyright Directive (96/9) articles 5 and 7, Copyright and the Information Society Directive, 2001/29 (articles 3 and 4) – online copies are deemed to be services, not goods; see also Sherwood, 52 – what may benefit the consumer may have detrimental effects elsewhere.
[66] See Opinion of Advocate General in *Zino Davidoff SA v A&G Imports* and Kallay, D. "Levi Strauss v Tesco: At a Difficult Juncture of Competition, IP and Free Trade Policies" E.C.L.R. 2002.23(4), 193
[67] See eg Whish, 18
[68] See IMS paras 26, 27, 28, 33, 39-42 but note ECJ in para 48 – key requirement is resulting consumer detriment
[69] See footnote 54
[70] Malloy1, 121, 126, 128/9, 133/4, 137 and Malloy, R.P. "Is Law and Economics Moral – Humanistic Economics and a Classical Liberal Critique of Posner's Economic Analysis" in Malloy, 156, 160, Evensky, J. "Professor Malloy, Judge Posner, and Adam Smith's Moral Philosophy" ("Evensky1"); 192; in Malloy; see Whish, 16/17

As a result of such divergence of theories and goals, it is unlikely that a single theoretical basis will emerge for competition law alone to restrict IP rights. Given the history of competition, economics and IP, it may not indeed be necessary for one approach to be identified for use of competition law to be valid.[71] If the present piecemeal approach continues, however, it is unlikely that future use of competition would achieve uniform support, and prospects of adoption and implementation would decline.

Even if a single theoretical solution could be found, the different challenges faced by encouragement, development and commercialisation of innovation in developing and developed countries,[72] suggest that global implementation would be problematic. Attempts to develop international competition law in this field have failed, through lack of support from developed countries,[73] although there are more informal co-operation arrangements.[74] Support remains, however, for more formalised multilateral co-operation in terms of competition and IP involving the developing world, while recognising that the needs of developed and developing countries differ.[75]

Finally, further intervention in the operation of global markets by regulators, courts and legislators, even if theoretically correct and desirable, and practically feasible, is

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[71] See for example the elision of theories by the EC Commission in XXIst Report on Competition Policy (1991), point 3

[72] See Braga, 411-416; Correa, 41; Sherwood, 159-173 and 175-177; CIPR, 20-4

[73] See failure of United Nations Conference on Trade and Development (UNCTAD) to develop International Code on Technology Transfer – see Lea, G. "Digital Millennium or Digital Dominion. The Effect of IPRs in Software on Developing Countries" in Drahos/Mayne, 151 – history seemed to repeated itself with the impasse at Cancun - see Ministerial statement adopted 14 September 2003 <http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_20_e.doc> and <http://www.economist.com/agenda/displayStory.cfm?story_id=2065723>

[74] Eg regard being had by EC Commission to US practices: see EC Commission's press release IP/00/1376 29 November 2000; see also Bellamy, C. and Child, G.; (2001) (5th ed) "European Community Law of Competition", Sweet & Maxwell, UK ("Bellamy and Child"), 39 and 613, with the Commission having regard to Antitrust Guidelines for Cooperation between competitors when framing new guidelines for horizontal cooperation agreements; co-operation between UK and Canada, see <http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02729e.html> and EU and China <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/04/597&format=HTML&aged=0&language=EN&guiLanguage=en>

[75] See Maskus, K.E. and Lahouel, M. "Competition Policy and Intellectual Property Rights in Developing Countries: Interests in Unilateral Initiatives and a WTO Agreement", 1, 2, 6, 9-16, 19-22 <http://www.worldbank.org/research/abcde/washington_12/pdf_files/maskus.pdf>

unlikely to be acceptable to multinational corporations, who would therefore likely lobby against the introduction of the system.[76] Further, courts and legislators are unsuited, due to a lack of specialist economic expertise,[77] to dealing with the complex questions of market definition,[78] market operation and licence terms,[79] particularly in the dynamic and innovative markets which would be involved in IP questions.[80] While regulators would be better placed to deal with such matters,[81] it is arguably inappropriate for fundamental questions involving restriction of rights to be decided, at least in the first instance, outside the legal framework.

Role of human rights

Human rights and IP has received significant attention in the accessing medicines[82] and traditional knowledge debates.[83] This reflects the global realisation that deprivation of life, health and property in such circumstances is immoral, irrespective of other justifications. In addition, throughout the world, concern at restrictions on access to and some uses of copyright material[84] and control of software[85] has led to argument based on rights to information, education and free expression. Such concepts initially appear better suited to countering some forms of IP, and delivering a solution to society's concerns, than an economic model.

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[76] as they have done in the past in this field – see above
[77] See Korah, 111, 116
[78] Eg EC Commission Notice on Market Definition; *United Brands v Commission* [1978] ECR 207; *Continental Can* ([1972] CMLR D11; Bellamy and Child, 685-7, 691; *United States v Eastman Kodak Co.,* 63 F.3d 95 (2d Cir., 1995)
[79] See Gallini, N.T. and Trebilcock, M.J. (1998) "Intellectual Property Rights and Competition Policy: A Framework for the Analysis of Economic and Legal Issues", in R.D.Anderson and N.T.Gallini (eds), *Competition Policy and Intellectual Property Rights in the Knowledge-Based Economy*, Chapter 2, Calgary: University of Calgary Press, 17-61("Gallini")in Towse, 24 - 68, 48-50; Sherwood, 32; Armitage, P. "Regulating Terms of Supply – When can Copyright Owners Refuse to Licence?" (1993) Australian Journal of Corporate Law Vol 3 No 3, 91, 92 re findings of Hilmer Committee
[80] See BW, 26, 35, 37; Gallini, 32/3
[81] Eg EC Commission due to their activities pursuant to Regulation 17/62 but see also Korah, 110-115 re lack of economic rigour on the part of the EC Commission
[82] See UN High Commissioner for Human Rights. Access to medication in the context of pandemics such as HIV/AIDS, tuberculosis and malaria. Commission on human rights resolution 2003/29. <http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.RES.2003.29.En?Opendocument>
[83] Eg <http://shr.aaas.org/tek/connection.htm>; Office of the High Commissioner for Human Rights "Human Rights and Trade" for Cancun, Mexico, 10-14 September 2003, 14-16
[84] See CIPR, 99-104, 105-110
[85] See CIPR, 104-5

Are such concerns, however, of legal relevance? There is significant consensus between international and regional human rights instruments as to relevant rights: life,[86] health,[87] property,[88] free expression,[89] information/education,[90] and also the rights to benefits of science[91] and to development,[92] although these are less widespread. That said, the existence of such rights is merely the start, not the end, of legal issues. The Vienna Declaration provides that all human rights are to be universal;[93] no guidance is therefore available as to how conflicts between rights are to be resolved. This is highly relevant to the IP debate, as the rights to life, health, benefits of science, development and free expression may be inconsistent with the rights to property of patent, copyright or plant variety owners.

Further, the consumer and competitor also have a relevant right to enjoy their own property which could be improperly stifled by the property right of the IP owner. As private rights of individuals have been afforded higher protection than commercial rights,[94] it is arguable that an individual's wish to educate themselves and others, or to develop their own second generation software, should be a legitimate exercise of their human right to property. To the extent that a property right of the IP owner should be reduced in such situations, there are then questions of the appropriate form of compensation, if any, to be paid, and by whom.[95]

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[86] European Convention on Human Rights 1950 ("ECHR"), article 2; International Covenant on Civil and Political Rights 1966 ("ICCPR"), article 6; American Declaration on Rights and Duties of Man 1948, ("ADRDM"),article 1; American Convention on Human Rights 1969 ("ACHR"), article 4(1); Universal Declaration on Human Rights 1948 ("UDHR"), article 3; and African Charter of Human and People's Rights 1981 ("African Charter"), article 4.

[87] International Covenant on Economic, Social and Cultural Rights 1966 ("ICESCR"), article 12; ADRDM, article 11; Additional Protocol to ACHR, article 10; UDHR, articles 24 and 25; and African Charter, article 16(1).

[88] Protocol to ECHR, article 1; ACHR, article 21; UDHR , article 17; and African Charter, article 14

[89] ECHR, article 10; ICCPR, article 17; ADRDM, article 4; ACHR, article 13; UDHR, article 19; and African Charter, article 9

[90] Protocol to ECHR, article 2; ICESCR, article 13; ADRDM, article 12; Additional Protocol to ACHR, article 13, UDHR, article 26; and African Charter, article 17

[91] Vienna Declaration and Programme of Action 1993 ("Vienna Declaration"), article 11; ICESCR, article 15(1)(b); Additional Protocol to ACHR, article 14(1)(b); and UDHR, article 27(1)

[92] Vienna Declaration, article 10; ACHR, article 26; and African Charter, article 22

[93] articles 1 and 5

[94] See *Campbell v MGN Limited* [2004] UKHL 22, para 148

[95] See *Sporrong and Lonnroth v Sweden* [1984] 7 EHHR 256 – fair balance to be drawn between the fundamental right, the interest and welfare of the individual to own and enjoy property and the public

The potential for conflict between IP and human rights is supported by the findings of the UN Sub-Commission for Protection and Promotion of Human Rights that the implementation of TRIPS is inconsistent with international human rights obligations; by its reminder to governments of the primacy of human rights obligations over economic policies and agreements, and its urging of governments to ensure the implementation of TRIPS and national IP legislation is done in a way which protects the social function of IP. [96] As against this, however, there is debate over whether some IP rights can themselves be human rights, to the extent that they protect and reward innovators and creators, consistent with rights in international instruments.[97]

More immediate, and no less problematic, is the fact that most human rights in instruments are not absolute and contain internal balancing requirements.[98] Thus even if a particular right is relevant, and should take precedence over an opposing IP right, it is by no means certain that the desired outcome will be achieved. That said, the fact that internal balancing acts often involve requirements similar to those mentioned above, such as protection of health and wider public concerns,[99] suggest that if the human rights were to prevail over an IP right, then victory would follow.

Thus, as noted by the UN, a key factor is the basic relationship between human rights and IP. While the UN stated that human rights should prevail on the basis of

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interest Cf *Case Concerning Certain German Interests in Polish Upper Silesia* (1926 Ser A no 7) Permanent Court of International Justice – expropriation if it is necessary for public utility. See also Malloy 1, 135

[96] UN High Commissioner for Human Rights, Intellectual Property and human rights, Sub-Commission on Human Rights Resolution 2000/7 ("2000 Resolution") <http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/c462b62cf8a07b13c12569700046704e?Opendocument> (articles 2, 3 and 6) and 2001 Resolution articles 3, 4 and article 5 (reflecting previous resolution save article 5 urges states to ensure that implementation of TRIPS does not conflict with human rights).

[97] consistent with article 27(2) UDHR and article 15(1)(c) ICESCR and see also 2000 Resolution article 1. See Chapman, 6, 10-12; and British Copyright Council in Addendum to the Report on Economic, Social and Cultural Rights, E/CN.4/Sub.2/2001/12/Add.1 3 July 2001, <http://www.hri.ca/fortherecord2001/documentation/commission/e-cn4-sub2-2001-12->, para III, A, 4 ("Addendum to Report on Economic, Social and Cultural Rights") cf Quaker United Nations Office/Friends World Committee for Consultation in Addendum to Report on Economic, Social and Cultural Rights para B, 1.

[98] Eg article 10 and article 1 Protocol 1 ECHR, article 6 ICCPR

[99] Eg article 10 ECHR

international law, they are not always seen to be respected, even with what from a liberal democratic perspective are established and uncontroversial rights, such as the freedom from torture[100] and freedom of political expression.[101] Further, the argument that human rights are supreme is assumed to be based on the relevant human rights being peremptory international norms.[102] Even if this correct, it is not a resulting principle of international law that all treaties must be in accordance with all human rights.[103] In addition, as international human rights law has focussed on practical questions of delivery and enforcement,[104] rather than the theoretical questions of the basis for rights and what they should be, it is unclear what would be the grounds for supremacy of all or any human rights over IP.[105]

Perspectives on the supremacy issue vary with the underlying basis for human rights. For example, there is less concern at introduction of new or restricted IP rights if one adopts a positivist [106] or utilitarian[107] approach to human rights, provided the necessary formalities are completed and balancing acts carried out. More fundamental questions are raised by natural law[108] and natural rights[109] theories, which entail inalienable human rights, to which IP must be secondary. The precise nature of these inalienable rights, however, is not taught; and to the extent that detail is available, for example, in the Lockean natural rights trilogy,[110] problems still exist, with the rights to property and life in potential conflict in the accessing medicines debate.

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[100]See eg <http://www.ibanet.org/humri/WebHRIDetails.asp?ID=74>
[101] See eg <http://www.hrw.org/backgrounder/mena/syria/>
[102] See Davidson, S (1993) "*Human Rights*" Open University Press, Buckingham, UK and Bristol, PA, USA ("Davidson"), 52-59
[103] See footnote 102. International law is unhelpful as to practical implications of another treaty, or national law, which is inconsistent with human rights. Treaties are simply assumed not to conflict, and will be interpreted in good faith to produce consistent outcome (article 31 Vienna Convention on the Law of Treaties 1969)
[104] Davidson 26, 43, 45, 164-5 – but see Kent, A. "*China, the United Nations and Human Rights*" (1999) University of Pennsylvania Press, Philadelphia, USA ("Kent"), 184-5 re limits of enforcement
[105] See Davidson, 24-5 regarding the importance of the underlying theory of human rights in respect of questions of ambit and enforceability.
[106] Shestack, 38-40]
[107] Tay, A. E-S. "Human Rights Problems: Moral, Political, Philosophical", ("Tay") in Galligan, 26-7
[108] Shestack, 36
[109] Shestack, 36-8
[110] See Eide, A. "Economic and Social Rights" in Symonides, 110 and Shestack, 36-8

A combination of the natural law, natural rights and justice theories of Kant,[111] Rawls,[112] Dworkin[113] and McDougal[114] are most relevant, particularly in combination with the evolving norms theories of economics,[115] to building a theoretical basis for contemporary interface between IP and human rights. By this approach, a societal model would be developed and values chosen, followed by identification of inalienable human rights for that society. It would then be appropriate for necessary restrictions to be made to IP to ensure that such rights were delivered.

At a practical level, however, it is unlikely that such a model could achieve widespread support. Notwithstanding progress with the Vienna Declaration, there remains a variety of moral perspectives, international political regimes and attitudes to the role of human rights.[116] Human rights are not part of Marxist socialist doctrine;[117] the emergence of the right to development[118] and recognition of the differing needs of indigenous communities[119] are at early stages; and in liberal democracies in the developed world[120] concern is being expressed at erosion of the function of democracy by a rights culture, with matters removed from parliament and the executive, and at decline in willingness of individuals to take responsibility and assume obligations.[121]

Again at a more practical level, there has been some national litigation regarding IP and human rights, focussing on instrumental human rights: in South Africa, considering the relationship between patents, compulsory licensing and parallel importing and the constitutional rights to life and health;[122] in England, considering the relationship between parallel importing of branded goods and the ECHR right to

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[111] See Shestack, 42-4
[112] See Shestack, 46-52
[113] See Shestack, 54-6
[114] See Davidson, 36/7 and Shestack, 53/4
[115] See footnote 70
[116] See eg Kent, 7
[117] See Shestack, 40-1
[118] See articles 10, 12 Vienna Declaration
[119] See articles 20, 28-32 Vienna Declaration
[120] Arguably the birthplace of modern human rights, giving rise to Paine, the enlightenment, and being the driving force for much post WW2 activity in international human rights - see Tay, 28-9
[121] Dalrymple, T. The Spectator 24 April 2004, 20
[122] See footnote 49.

property,[123] and copyright and the ECHR right to freedom of expression;[124] in the United States, considering encroachment of copyright on the public domain and constitutional rights;[125] and in the Netherlands, considering copyright and the statutory right of freedom of expression.[126] Where these cases have been decided, however, those seeking to rely on human rights have either been unsuccessful or have achieved the outcome which would have resulted if the arguments had merely focussed on existing checks within IP regimes, such as the public interest. That said, there are indications that in rare cases, the public interest may include human rights, thus providing human rights with a role within an existing framework.[127]

Accordingly, these authorities do not support the suggestion that either IP or human rights should be an absolute trump over the other. They favour the view that, at least at practical and instrumental levels, the correct focus is achieving an appropriate balance, reflecting the delivery element of the theoretical model suggested above. There has been no case law consideration, however, of the relationship between IP and the right to development or the right to life, which may produce a differen outcome or at least involve a different balancing act. Further, likely because of the breadth of human rights instruments, no cases have considered arguments of alleged human rights based solely on theoretical grounds; nor has there been international case law considering the fundamental questions identified by the UN Sub Commission.

Existing Potential Solutions?

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[123] Levi
[124] *Ashdown v Telegraph Group Ltd* [2002] R.P.C.5 ("Ashdown")
[125] *Eldred v Ashcroft* (US) ("Eldred") see <http://www.techlawjournal.com/topstories/2003/200301/5.asp>
[126] *Uitgeverij Byblos B.V. v Joanne Kathleen Rowling, Uiteverij De Harmonie B.V. and Time Warner Entertainment Company, LP* [2004] E.C.D.R 7
[127] Ashdown, H10, para 45, H11, para 46, para 47. See also Krikke, J. Case Comment *re Church of Scientology v XS4ALL* [2004] E.I.P.R. N50

Courts in England have looked creatively at the question of the scope of IP. This led to the "spare parts exception" and the concept of non derogation from grant[128] to avoid IP causing unjustifiable restriction on competition and encroachment on property. Significantly, however, notwithstanding their motivation, the House of Lords based their decision on English common law and copyright, rather than competition or human rights. They also stressed that the restriction was limited to copyright, should not be a basis for encroachment on what it saw as the statutory monopolies of patents and registered designs, and urged review and reform of copyright legislation. A reluctance to engage in judicial activism was later seen from the Privy Council[129] who held that the preceding decision stemmed not from law but from public policy, which should not have priority over an express statutory right, and should only be applied where there was plainly anti-competitive conduct and unfairness to consumers. Subsequently,[130] it was confirmed that public policy should prevail over IP only if "no thinking member of society would dispute its validity".[131]

Thus, through competition, human rights, overriding questions of public policy and the existing exceptions to IP referred to above, potential counters to IP do exist. However, the fall out from TRIPS teaches that simply because solutions exist, they may not be allowed to be workable.

Although there had been many IP treaties in the past,[132] TRIPS was groundbreaking. It set minimum standards of protection for each IP right, which were higher than those in place in many signatory countries. Further, because the treaty was part of the WTO, if countries wished to have other benefits of membership (or promised (but rarely delivered) benefits – for example new markets for agriculture for developing

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[128] *British Leyland Motor Corporation v Armstrong Patents Company Limited* [1986] R.P.C 279 - in that case, owing to a combination of existing case law and piecemeal development of copyright and design legislation, wide power was conferred on the copyright owner, which could be used to prevent a car owner having the car repaired, or obtaining spare parts, other than from an authorised source, where they would be very expensive

[129] *Canon Kabushiki Kaisha v Green Cartridge Company (Hong Kong) Limited* [1997] F.S.R 817, 823-4

[130] *Mars UK Ltd v Teknowledge Ltd* [2000] E.C.D.R 99, 105 ("Mars")

[131] Mars, 108

[132] Eg Paris Convention, Berne Convention

countries) they were required to provide this protection.[133] In addition, owing to pressure from the developed countries, driven by the attitudes of IP owning multinational corporations, useful tools considered above were not explored in a manner conducive to bringing about a balanced workable global IP regime.[134] Indeed, it is questionable to what extent there was any genuine dialogue or accord, rather the imposition of a *fait accompli*.[135]

While the general nature of permitted exceptions in TRIPS did leave it open to signatories to adopt their own regimes, again pressure from developed countries has meant that the failure to entrench has effectively destroyed useful tools. This has been a result of the use by the United States and the EU of bilateral trade agreements,[136] and trade and customs legislation[137] to ensure that partners introduced IP in excess of the minimum standards of TRIPS, and did not permit compulsory licensing or parallel importing. This has rightly been strongly criticised,[138] particularly given increased use in both the EU and the United States of compulsory licensing to restrict use of IP to inhibit commercial growth and competition,[139] and in statutory regimes.[140] The power of multinational lobbying, this time from publishers, was also seen in the EU when the proposed introduction of a compulsory licence to the new Database Right

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[133] See Sherwood,1, 5; Murakyembe, 133.
[134] Eg parallel importing was specifically not dealt with (article 6), and compulsory licensing merely permitted as an option (article 31) – see also footnote 25.
[135] See Drahos1, 167-9
[136] See CIPR, 162-3, Chapman, 30, Drahos1, 169
[137] US based on section 301 Tariff Act; and EU Regulation 264/84 enabling unilateral declarations and sanctions if it is considered that a state's laws breaches US or EU rights under WTO rules. See also Murkyembe, 113 and Drahos, 167-8
[138] UN Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights. Economic, Social and Cultural Rights. The impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on human rights. Report of the High Commissioner. E/CN.4/Sub.2/2001/13 27 June 2001 http://www.hnhchr.ch/huridocda/huridoca.nsf recommendation 69
[139] Using a form of the essential facilities doctrine, at least in the United States: EU - if IP right being used but consumer demand in separate market not being satisfied - IMS; 28 U.S.C 1498. See Mercer, I "Patent Wrongs" 29 March 2001, CIPR 42 http://www.mises.org/fullstory.asp?control=641&FS=Patent+Wrongs. ("Mercer") and Singh, S. "Compulsory Licensing Good for US Public, Not Others" <http://www.twnside.org.sg/title/public-cn.htm>, ("Singh") 2
[140] Eg US Copyright Act, s111, 115, 119; sections 237-239 and paragraph 19 Schedule 1 CDPA regarding unregistered design right

was abandoned,[141] leading, unusually, to suggestions that general principles both of competition law and human rights should be used to deal with issues arising.[142]

Rather than work with existing rights, another solution is the creation of new rights, for example the EU Database[143] and Design[144] Rights, and Farmers' Rights.[145] The ability to do this is, however, restricted by TRIPS in so far as the subject matter of the rights falls within it, given the need to comply with the minimum standards.[146] Wholesale or creative reconsideration of IP rights (for example restriction of patent term to 10 years, copyright term to 5 years, limited utility model type rights for controversial or groundbreaking areas, perhaps with a restriction on when they may be enforced) can only be achieved by a revision of TRIPS. Although this is a goal of its many critics, particularly those supporting the cause of developing countries,[147] the nature of its negotiation and the ultimate outcome suggest that this is unlikely.[148] That said, public outcry and NGO lobbying in respect of anti-globalisation and accessing medicines, which has limited WTO proceedings against developing countries,[149] may consolidate into a platform for more formal change in this field.

These issues are highly relevant to progress. Not only does the status quo involve an international standard setting treaty, but given the prevalence of cross border trade and the global nature of the social concerns identified at the outset, some form of international solution is likely required to produce an effective outcome. However, any solution would not necessarily, and should not, require the imposition of uniform

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[141] EC Database Directive (96/9). See Mirchin, D "The European Database Directive Sets the Worldwide Agenda", <http://www.nfais.org/publications/white_papers_2.htm>3.
[142] Vaver, D. "Recent Copyright Developments in Europe", 6 NOTES for a session at the International Conference on *The Commodification of Information*, May 30-31 1999, Faculty of Law, Haifa University <www.oiprc.ox.ac.uk/EJWP0699.html>
[143] See footnote 141
[144] See Council Regulation (EC) 6/2002
[145] These have been introduced in India. See Sahai, S. "India's Plant Variety Protection and Farmer's Rights Legislation" in Drahos/Mayne, 214-211; and CIPR 67-9 re global bases
[146] Article 1, TRIPS
[147] Suggested in Report on Economic, Social and Cultural Rights, paras II, B, 8-9; see also Helfer, 48, 57-9.
[148] See CIPR, 160
[149] and indeed general recourse to WTO dispute resolution procedures against developing countries – see Arup, C "TRIPS: Across the Global Field in Intellectual Property" EIPR 2004, 26(1), 7-16, ("Arup") 13

standards.[150] That said, the experiences of TRIPS,[151] the Vienna Declaration[152] and Cancun[153] teach that the power of lobbyists and secondary motives in directing the fate of international instruments cannot be ignored, nor can the difficulties posed by seeking to harmonise and respect conflicting national norms and economic circumstances. Encouragingly, however, these challenges have not prevented ongoing attempts by the international community to address specific problems, for example at The World Summit on the Information Society.[154]

In the real world

Achievement of a new formal international regime is also unlikely to be the end of the matter. The review, enforcement and monitoring procedures in place to ensure compliance with TRIPS[155] and human rights instruments[156] have been of limited effect, raising the prospect of any new treaty being disregarded with impunity. While it would be possible for states to turn to WTO dispute solution procedures,[157] the prospects of this being done, and the outcome adhered to, is inextricably linked with the respective powers of states and their economic interdependence,[158] the very factors which create problems with the present regime. Further, as the WTO rules do not have direct effect, the scope for impact is always limited.[159]

Effectiveness of dispute resolution is not confined to the international arena. If an IP owner seeks to enforce a right, even if the court action itself may be anti-

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[150] See criticism of such standards in Macdonald, 35/6 and Drahos, 1
[151] See above
[152] See Kent, 37 and 164
[153] See footnote 73
[154] World Summit on Information Society – Geneva 2003 – Tunis 2005 – Declaration of Principles WSIS-03/GENEVA/DOC/4-E
[155] See Arup**,** 10 – articles 30, 63 and 66 TRIPS are relevant, however little has been done, particularly regarding developing countries
[156] See article 27 and Section E Vienna Declaration; Kent, 184-5
[157] Article 64 TRIPS provides that disputes relating to implementation are to be dealt with pursuant to articles XII and XXIII GATT 1994. There has been some use of these: see *DS 160* and *DS 114*
[158] See Chang, P-L. "The Politics of WTO Enforcement Mechanism" 9 January 2004, 21 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=506442>
[159] See Zonnekeyn, G. A. "The Status of WTO Law in the Community Legal Order: Some Comments in the Light of the Portuguese Textiles Case" E.L. Rev. 2000, 25(3), 293-302

competitive[160] or the threat of it unjustified,[161] time, cost, commercial pressures and fear of failure in court may lead to concessions being made to resolve the situation. This could result in the IP owner gaining benefits to which they are not strictly entitled. The prospects of this are increased if there is forum shopping[162] (likely an option in international situations and permitted by many courts) with a jurisdiction chosen which favours IP owners and is unfamiliar to the alleged infringer. Further, there is the possibility of essentially same dispute being fought over national rights in several courts, with different results:[163] the prospect of this is again likely more appealing to the IP owner.

Accordingly, economic power and the attitudes of IP owners are fundamental to what will happen in practice, whatever can be achieved at a higher level.[164] As a result, corporate social responsibility, which has already had practical results in the environmental[165] and pharmaceutical[166] fields, is likely to be a more productive means, and opportunity,[167] of preventing perceived abuses of IP. This may result in states and corporations being encouraged to reach, and abide by, more morally acceptable international arrangements, and some progress has already been made in this regard.[168] This may be fuelled by the increased value placed by individuals on global social issues, the rise of individual involvement in NGO and single issue

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[160] *ITT v Promedia*, [1998] ECR II-2937
[161] see section 70 PA and section 21 TMA
[162] where choice is made between more than one jurisdiction which would be entitled to hear the case – examples of relevant rules are found in the UK Civil Jurisdiction and Judgments Act 1982
[163] Eg UK (EP) and German (EP) patent infringement disputes heard in the England and German courts respectively with different outcomes
[164] See also Klein, XXII re superseding of government by corporations
[165] See Monsanto's decision in May 2004 to cease commercialisation of Roundup Ready, due to pressure from activists, consumers and US and Canadian farmers: Phillips, P "Seeds of doubt over Monsanto decision" 12 May 2004 <http://www.globeandmail.com>
[166] See reduced prices in Africa of Merck and Bristol Myers - Mercer; and activities of Centre for the Management of Intellectual Property and Health Research and Development, encouraging balanced and ethical licensing (see <http://www.mihr.org/>)
[167] Klein, 361
[168] Eg United Nations Global Compact (see <http://www.humanrightsfirst.org/workers_rights/wr_other/wr_other.htm>); Norms of Responsibility of Transnational Corporations and Other Business Enterprises in Regard to Human Rights for the United Nations ("UN Norms") <http://www1.umn.edu/humanrts/links/norms-Aug 2003.html> of UN Human Rights Sub-Commission (August 2003), to bring about greater accountability of business. See also Speeches of The 2003 Business and Human Rights Seminar 9 December 2003, London, <http://www.business-and-human-rights-seminar.org/docs/Speeches.pdf>, 20-2, particularly regarding ultimate goal of treaty.

activity[169] and growth elsewhere of human rights approaches[170] which could also be applied to IP.[171] Such an inclusive approach is indeed consistent with theories of the legitimacy of law, which stems not only from court decisions and imposed legislation, but the values of the underlying society.[172]

Against this backdrop, it is perhaps not surprising that there has been discussion of new means of encouraging and sharing innovation, without reliance on conventional IP rights. Increased collaboration between the private and public sectors with Public Private Partnerships and the use of Private Finance Initiative to fund projects has been suggested,[173] as has the use of open source principles to share knowledge the subject of IP.[174] Such suggestions have also been fuelled by concerns as to the rights obtained by private interests over developments and material which arguably should be shared by all, particularly in respect of fundamental scientific advances.[175]

This raises basic questions about the political structure and beliefs of modern global society (to the extent that it in fact exists). Increased public funding and activity are unlikely in capitalist societies, with their increase focus on private funding.[176] Even if the money were available, political will to impose such a system may be lacking, particularly given the power of IP owning corporations; in any event, a detailed review of management and infrastructure would be required to ensure that the differing focuses of public and private innovation continued to be met.[177]. However,

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[169] See Marks, S.P. "Common Strategies for Health and Human Rights: From Theory to Practice", in Mann, J.M., Gruskin, S., Grodin, M.A., Annas, G.J. (1999) "*Health and Human Rights: A Reader*" Routledge, New York, USA and London, UK, 397; Drahos1 175; Evensky1, 194 . The value of NGO activity in the human rights field is recognised in articles 38 and 73 Vienna Declaration

[170] UN Declaration on Right to Development and see <http://www.unhchr.ch/development/approaches.html>

[171] See also Helfer, 48, 58; CIPR 163

[172] See Davidson, 31 re Hart; Evensky, 202, 204

[173] See CIPR, 130; Mellor, N. "IP management in global healthcare" Scrip Magazine March 2003, 6

[174] open source has also been raised as a potential solution in the traditional knowledge debate: see outlines for The SLSA Annual Conference 2003 Gibson, J. "Developing Knowledge Traditionally: Global Trade, Traditional Knowledge, and the Open Source Debate, and Guadamuz Gonzalez, A. "Share and Protect: Copyleft Licences and Global Technology Transfer" <http://www.law.gla.ac.uk/slsa2004/title.html>. See in addition "An open-source shot in the arm?" The Economist, (UK edition) June 12th-18th 2004, The Economist Technology Quarterly, 15

[175] See also footnote 23

[176] See Chapman, 24-5

[177] Gutterman, 140-1

even abandonment of capitalism would be unlikely to assist, as research and development has not prospered in socialist/Marxist regimes, with IP systems being introduced to encourage activity and foreign collaboration.[178] Accordingly, private rights over innovation and creativity appear likely to continue in some form.

Contribution

My research will build on and combine the existing writings, legislation and case law regarding rationales for different forms of IP; the need for restriction on some or all IP; the potential roles of competition and human rights in this regard; means by which new systems of IP could be implemented and enforced; the practical importance and legal relevance of corporate social responsibility and evolving social conscience; and identify effective and enforceable means, normative or organic, through which legal doctrines can be used to address areas of global social concern perceived to be caused by IP.

Although increasing work is being done in the fields of competition and IP, and human rights, corporate social responsibility and IP, the inter-disciplinary nature of my work is unique. The combination of the three fields, and reference to wider social and philosophical principles, is important to provide a holistic legal solution for use both now and in the future when new issues will doubtless arise with further emerging technologies. The alternative is for international and national legal progress to be driven by economic considerations and the interests of the developed world and multinational corporations, with humanitarian and social concerns seeking to redress the balance, producing increasingly polarised views and split societies. Such an outcome would deprive IP, and the law generally, of its legitimacy.

[178] See Cornish, 3